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Criminal Defense Attorneys of Michigan

2843 East Grand River, PMB 223 • East Lansing, MI 48823 • (517) 490-1597 • Fax (517) 267-3630

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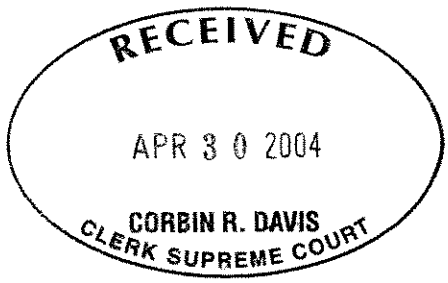
Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909



Re: Proposed amendments to court rules
Administrative File No. 2003-04

Dear Mr. Davis,

As Chair of a special committee of the Criminal Defense Attorneys of Michigan, I am writing on behalf of the association in regard to the proposed changes to the criminal procedure court rules. Other members of the committee were John R. Minock, who authored the response to the discovery chapter, F. Martin Tieber, who authored the response to the rules relating to the Motion for Relief from Judgment procedure (MCR 6.500 et seq.), James R. Samuels and Michael Steinberg. While some of the proposed changes are either positive or unobjectionable, CDAM does have very strong objections to some of the rules. I will detail those objections below. Before I do so, I would like to make it clear that CDAM also endorses the comments you have received individually from members F. Martin Tieber, Craig Daly, and James Lawrence.

MCR 6.004(D) Conditioning the 180-Day rule on notice from the Department of Corrections (DOC)

Under the proposes change, an incarcerated defendant would not have a right to proceed on pending charges within 180 days unless the DOC sends a notice to the prosecutor that it is holding the defendant. Conditioning an important statutory right on anticipated action by the DOC will not serve to protect the defendant. There appears to be no incentive for the DOC to send the notice and no sanction for not doing so. This proposal effectively strips a defendant of a right conferred by statute.

MCR 6.006(B)(2) Permitting Video Testimony at Trial

Any rule permitting a witness against the defendant at trial to testify via video without the express consent of the defendant would violate the constitutional right of confrontation as defined by the US Supreme Court in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In light of the strong preference for face-to-face confrontation, this proposal should be discarded.

MCR 6.110 (D) – Elimination the Exclusionary Rule at Preliminary Examinations

As the Court said in *People v Weston,* 413 Mich 371, 376 (1982): "A preliminary examination functions, in part, as a screening device to ensure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed should be cleared and released as soon as possible." In permitting bindovers based on evidence that would not be admissible at trial, the proposed rule effectively destroys the purpose of the preliminary exam. If the only evidence adduced at the prelim is evidence that will be excluded at trial, then by definition there is insufficient evidence to proceed to trial. The current rule, which explicitly permits the district court to consider and rule on motions to suppress, is sound rule and should not be discarded.

While this rule would not run afoul of United States Supreme Court precedent, it is nevertheless a bad idea. Again, it serves no purpose to permit a bindover when the evidence relied on cannot be admitted at trial. If anything, the current rule permitting the exclusion of illegally seized evidence at the prelim, is a docket control mechanism that prevents legally insufficient cases from taking up valuable circuit court time.

6.113 (D) – Elimination of Mandatory Preliminary Exam Transcript

While it is true that a preliminary exam transcript is not necessary in all cases, the Court should not eliminate the mandatory transcript rule unless it is replaced with a reasonable alternative. There should be a rule requiring preparation of a transcript if requested by either side. If there is no request, the court should not have to order preparation of a transcript.

6.201 Discovery

(A) The introductory paragraph to the rule refers to the statute, MCL 767.94a. However, since in *People v Phillips*, 468 Mich 583 (2003), this Court held that the court rule rather than the statute controls the criminal discovery process, reference to the statute may be moot, since it appears the statute can neither expand nor restrict the process.

(1) Disclosing witness addresses.

The proposed rule change, which allows a party to make a witness available for interview in lieu of providing the witness' address, should be further amended. (Some county prosecutors, including Wayne, already follow this proposal as a matter of policy, ignoring the requirement in the existing rule of providing the addresses of witnesses. Most counties, such as Washtenaw, provide witness addresses without hesitation.) The

proposal mistakenly places the discretion whether to provide an address with a party rather than with the court, leaving too much potential for abuse.

The issue of whether to not disclose a witness' address should be decided by the court. If a party seeks to avoid disclosure of a particular witness' address, the party should have to justify it and seek a protective order under subsection E. Witnesses are not within the control of the parties. An attorney can only ask or encourage a witness to submit to an interview. An attorney cannot ethically request a witness to refrain from giving relevant information to another party. MRPC 3.4(f). An attorney does not need the permission of opposing counsel before contacting a witness directly.

In addition, a defense attorney has the constitutional obligation to prepare and investigate a case, which often includes investigation of witnesses' backgrounds. Such investigation can be impeded or rendered impossible without having an address as an identifier. A witness cannot constitutionally refuse to provide an address on cross-examination. In *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), reversing a conviction on confrontation grounds where the defendant was prevented from cross-examining the principal prosecution witness regarding his name or where he lived, the Court said:

> [W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. ***The witness' name and address open countless avenues of in-court examination and out-of-court investigation***. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. Id. at 131, 88 S.Ct. at 750. (Emphasis added.)

If a witness must ultimately answer with his address on cross-examination, the circumstances in which failure to disclose it in discovery are justified will necessarily be very narrow.

If the proposal is adopted as written, it will invite nondisclosure, contrary to the purpose of the discovery rules, and will necessitate defense discovery motions in every case. Prosecutors will offer to make witnesses available for interviews at their office, with the condition that a prosecutor be in attendance, as a matter of policy, instead of providing addresses. Defense lawyers will quickly respond in kind. Neither side will have access to the other's witnesses. Instead of promoting nondisclosure, the rule should be rewritten to require a motion for protective order as the most practical mechanism to deal with the exceptional case.

(3) Expert witnesses.

The Committee proposal was written before the decision in *Phillips*, but assumed that the court rule governs. The proposal requires that a party provide the curriculum vitae of a listed expert and a report by the expert or a description of the substance of the proposed testimony, the opinion, and the basis of the opinion.

The proposal is similar to Federal Rule of Criminal Procedure 16. Rule 16(a)(1)(F) requires that if the government intends to call an expert witness, upon defense request it must disclose to the defense a written summary of the expert's expected testimony, and the summary "shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." A defendant has a reciprocal duty to disclose upon request a summary that must include the same information. FRCrP 16(b)(1)(C).

6.310 (C) and 429 (B)(3) Reducing the Time for Filing Motions to Withdraw Plea and to Correct Sentence

Reducing the time to file a motion for plea withdrawal and correction of sentence to six months is a problem in guilty plea cases. While six months sounds like a great deal of time on the surface, most of it is eaten up by the request for counsel (42 days), paperwork processing before the judge signs the order of appointment (several days to several months depending on the county), and the filing of the transcripts (28 days from the order of appointment, but not all court reporters comply). This takes several months in the typical case. In the less-than-fast-moving case (not that unusual), it can take all or most of the proposed 6-month period. The proposed 6-month deadline (like the current 12-month deadline) has no room for extension. In the case that takes 4-5 months to get to the appellate attorney with prepared transcripts (not unheard of in Wayne County), the appellate attorney will have less time to file the post-conviction motion than one would have to file the brief on appeal in a claim of right case (56 days plus any stipulated extension). This is a problem in plea appeal cases where the reality is that the trial court motion, either for resentencing or plea withdrawal, is often the most important pleading filed in the case (and nearly always necessary to preserve the issues). For plea cases in particular, it will become a real struggle to properly raise and preserve issues for appellate review. We strongly recommend against moving to a six-month deadline.

6.500 Relief From Judgement

Because of the extensive changes to this chapter, the following comments are necessarily extensive.

MCR 6.501 – Limit to Those Incarcerated

The first proposed change in this section is the addition of a custody requirement, akin to federal habeas. This is, however, not a habeas provision.[1] It is a request to be relieved from the impact of an unjust conviction (relief from judgment). In proper cases the relief provided should be available for one released as well as for one incarcerated. In many instances it is difficult, if not impossible, for someone incarcerated to appropriately and adequately challenge an unjust conviction. The resources are simply not there and an individual illegally incarcerated might need time on the outside to put together funding to hire competent legal assistance.[2]

Although statistics are not apparently available, an informal survey of CDAM members who handle postconviction work suggests that filing on behalf of non-incarcerated individuals is extremely rare, and thus not a factor in docket management. On the other hand, the impact of an unjust or illegal conviction does not cease when the individual walks through the prison gates. Elimination of job and educational opportunities, parole restrictions, and SORA registration for some, are just a few of the continuing effects of a criminal record. One who has been unjustly or illegally convicted should not be deprived of all recourse simply due to lack of current incarceration.

MCR 6.501(D) – Limitation on Process

The addition of 6.501(D) – "Consideration of Mislabeled Requests for Relief" – is a thinly veiled attempt to remove statutorily authorized avenues for obtaining relief from illegal and unjust convictions in direct contravention of this Court's recent decision in *McDougall v Schanz.*[3] MCL 770.1 and 770.2 allow for the filing of new trial requests at any time for good cause shown "when it appears to the court that justice has not been done." MCL 770.16 allows new trial motions, under certain conditions, through January 1, 2006 in DNA cases. The legislature has resolved that justice and innocence are worthy of protection. This Court under the reasoning of its own cases should not countenance the attempt of the proposed rules to restrict or remove those rights.

MCR 6.502 - Page Limit

The implementation of a 25-page limit under changes proposed to MCR 6.502(C) is inappropriate. The page limit applies to the motion **and** any brief or memorandum in support. In many instances these filings are complex and come after conviction and direct appeal proceedings, all of which must be described in enough detail to provide the court with the proper procedural background on the case. The rule (MCR 6.502(C)(1)-(15)) sets out no less than fifteen items that must be included in the motion. In many

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[1] Michigan does have provisions for habeas relief. See MCR 3.303.
[2] See the discussion in this regard in relation to the one year limit proposed under MCR 6.508(E), *infra.*
[3] 461 Mich 15 (1999). See also, *People v Glass,* 464 Mich 266, 280 (2001); *Terrace Land Development Corp. v Seeligson & Jordon,* 250 Mich App 452, 456 (2002).

cases the description of all previous proceedings engaged by a defendant require multiple pages.

These filings are actually more complex than direct appellate filings because, in addition to laying out the substance of a claim, the movant must demonstrate an ability to hurdle the procedural bars set out in MCR 6.508. If a page limit is deemed necessary there is no reason why the 50-page limit currently in place for direct appellate proceedings should not be the limit adopted here. The prosecution should be allowed the same number of pages (See proposed change to MCR 6.506(A)).

Implementing a 25-page restriction will, in many if not most cases filed under this rule, require ancillary motions to allow pleadings over the limit. This will tax judicial resources and result in inequities as some judges will regularly grant and some will virtually always deny. In many cases where permission is denied a litigant will be forced to choose between dropping critical material or engaging in the use of appendices and other artifice to set out the necessary information and argument. Justice should not be limited by over-restrictive technicalities that prevent a defendant from making an effective presentation that, in many instances, will be the last opportunity to challenge their conviction and incarceration. All effective practitioners understand the need for brevity and its import in successful pleading practice. However, effective practice cannot be artificially established by across the board rules that are too limiting in relation to the complex nature of the litigation at issue.

MCR 6.508 (D) – Review Standards

While dispensing with the obtuse and time consuming "cause" requirement is an improvement, the overall impact of the proposed changes to the standards of review under Michigan's postconviction rule are unjust and will unduly inhibit the ability of our court system to remedy unjust and illegal convictions and sentences. Under these changes there will be no recourse for 1) irregularities so offensive to the maintenance of a sound judicial process that a conviction should not be allowed to stand notwithstanding impact on the outcome, 2) involuntary guilty pleas or 3) sentences that are illegal and/or unconstitutional. While no one would suggest that success is easy to come by under the present strictures, litigants who could legitimately argue the points raised above at least had a chance to make a case for the grant of relief.

Under the proposed standards, if tried, a conviction cannot be reversed under this postconviction process unless based in part on an irregularity that is "so offensive as to seriously affect the fundamental fairness, integrity or public reputation of judicial proceedings" **and** unless correction would probably lead to a different result on retrial. This Court's obligation to ensure the constitutional adequacy of our "one court of justice" demands that the ability to redress irregularities offensive to the maintenance of a sound judicial process be protected, regardless of the ability to claim a different result is probable.

A separate provision allows relief in trial conviction cases where a different result would probably ensue from a "fully[4] retroactive change in the law."

Under the proposed changes, after a conviction by plea a defendant must show actual, factual innocence through evidence not previously presented or that the sentence exceeded statutory authorization to obtain relief. In other words, guilty pleaders need not apply. Such restrictions completely eliminate the ability to remedy plea based convictions which are clearly involuntary[5] and sentences that are based on violations of statutory guidelines or even sentences that are unconstitutionally fixed through reference to race, sex or national origin.[6] Given the present state of fees for appointed counsel in indigent cases in this state, and the impact of this abject funding failure on effective representation at trial and on direct appeal, justice should not be circumscribed so completely and so permanently.

MCR 6.508(E) – One-Year Time Limit

CDAM strongly urges that this Court refrain from adopting a technical one-year time limit for seeking relief under MCR 6.500. CDAM agrees with the comments previously provided to this Court by attorneys Craig A. Daly and James S. Lawrence on this point.

The poor will feel the impact of this change. Those with money will be able to engage the services of knowledgeable attorneys to protect their rights. The vast majority of our prison population is indigent and uneducated, and many are beset by severe physical and mental problems, including mental retardation, mental illness and drug and alcohol addiction, conditions that make timely filing without assistance virtually impossible. Competent legal assistance is not readily available to the poor who are incarcerated in this state.[7] In some instances, after many years, inmates, through good fortune or coincidence, may obtain the ability or the resources to adequately present a postconviction attack. They should not be cut off from the ability to seek justice on the basis of a technical time limit.

It should be noted that the federal habeas process interposes a *de facto* time limit on Michigan postconviction work. This is so because the usual motive behind postconviction activity in Michigan is preserving federal issues not raised on direct appeal or federalizing issues raised but not exhausted for federal court. While state postconviction activity tolls the one year time limit under the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA),[8] such activity must be engaged within the initial

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[4] CDAM agrees with the comments of attorney James S. Lawrence, previously provided to this Court, in respect to the inappropriate inclusion of the word "fully" here. If a change in the law is retroactive to a litigant's case it should not matter that it may not be retroactive in some other case.

[5] Currently, under MCR 6.508(D)(3)(b)(ii) relief is available if a defect rendered the plea involuntary "to a degree that it would be manifestly unjust to allow the conviction to stand."

[6] Presently, "invalid" sentences are subject to challenge under MCR 6.508(D)(3)(b)(iv).

[7] Many CDAM practitioners who handle appellate and postconviction work do give of their time in a *pro bono* capacity, though each of those who do will attest that the demand far outstrips the available time.

[8] Pub L No 104-132, 110 Stat 1213 (codified, inter alia at 28 USC 2244 et seq.)

one year period in order to keep federal habeas possibilities alive. The point is that those with resources and ability will not be impacted by the proposed one year limit on Michigan postconviction filing under MCR 6.500 *et seq.*

Several other states have recognized the impropriety of putting deadlines on the ability to petition for relief.[9] Other states, though carrying limits, recognize that one year is too short.[10] Still other states allow for exceptions to the timing requirements that somewhat limit the damage to the ability to redress severe injustice.[11] Texas, which does carry a time limit, allows for filing at any time if successive petition conditions are met.[12]

The mechanistic and inflexible time limit proposed here will severely restrict the ability of the poor to seek redress for injustice. Given the present ban on successive motions unless there is a claim of new evidence or a retroactive change in the law, an inflexible time limit is not necessary for docket control. CDAM urges this Court to reject the one-year time limit. If this Court is determined to limit the ability of the poor to seek justice, CDAM urges that the limit be made more flexible by adoption of exceptions for government interference, excusable neglect and actual innocence (see footnote 11, *supra*). Finally, if a time limit is adopted, CDAM urges this Court to allow for a grace period permitting filing, during the time limit adopted, by all prisoners currently convicted and incarcerated, measured from the time of adoption of the limit as Congress did when adopting the AEDPA one year limit in 1996.

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[9] New Mexico, Rule 5-802 NMRA 2003; Colorado 16-5-402 CRS (for life offenses); California (habeas procedures); Indiana, PCR 1(1)(a). It should be noted that Indiana, while not carrying a time limit, does allow the prosecution to argue laches if it can be shown that the petitioner unreasonably delayed (knew about rights but did not pursue) and the delay would substantially prejudice the prosecution. See *Armstrong v State,* 747 NE2d 1119, 1120 (Ind. 2001). A similar provision could be appended to Michigan's postconviction process if the concern is undue prejudice to the prosecution.

[10] Louisiana, C.Cr.P. art. 930.8 (2 years); New Jersey, NJ CR 3:21-12(a) (5 years).

[11] Actual innocence (Illinois, 725 ILCS 5/122-1); Non-culpable negligence (excusable neglect) (New Jersey, NJ CR 3:21-12(a); Illinois, 725 ILCS 5/122-1); Interference by government officials (Pennsylvania, 42 PACSA 9545(b)).

[12] Texas Code Crim Pro art. 11.071.

Conclusion

We apologize for the length of these comments but in light of the extensive and radical changes in the proposed rules, a terse response was impossible. CDAM asks the Court to engage in a critical review of the proposed rules and to take these comments into consideration.

Respectfully submitted,

Criminal Defense Attorneys of Michigan

By: _____

Professor Ronald J. Bretz
Thomas M. Cooley Law School
300 S. Capitol
Lansing, MI 48933